## UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES NEW YORK BRANCH OFFICE

ATLANTIC VEAL & LAMB, INC.

AND

CASE NOS

29-CA-24484

KNITGOODS WORKERS' UNION,

LOCAL 155. UNION OF NEEDLETRADES.

29-CA-24669

Kathy Drew King Esq., Counsel for the General Counsel Steven B. Chesler Esq., Counsel for the Respondent <sup>1</sup>

**INDUSTRIAL & TEXTILE EMPLOYEES, AFL-CIO** 

## SECOND SUPPLEMENTAL DECISION

Raymond P. Green, Administrative Law Judge. On May 28, 2010, the Board issued its Decision at 355 NLRB No. 38, remanding this case to me for further findings. Although the Board adopted certain findings, it remanded this matter in order to determine what if any backpay amounts are owed to Jeorge Ogando for the period from his discharge on August 28, 2001 until June 7, 2004.

The principle issue here is whether Ogando willfully concealed interim earnings or whether his testimony merely showed "discrepancies" resulting only in "mere suspicion and uncertainty." A second and related issue would be whether the documentary evidence submitted by the Respondent, whether or not establishing "willful concealment," nevertheless shows that Ogando had substantial interim earnings for the period in question so that his claim of net backpay for that period would be zero or at least far less than what is asserted by the General Counsel.

On June 4, 2010, I sent a letter to the parties requesting their positions on this matter. I also asked them to advise me as to whether they thought that the hearing should be reopened for further evidence. In pertinent part, I stated:

There was a conflict with the Ogando's assertion that he never was employed by Royal Quality General Construction Inc. or any entity operated by Angel Diaz and the evidence that documentation such as W2 and income statements in the name of that company were submitted to a bank in connection with a sizeable mortgage given to him. Since it was stipulated that these documents were in fact submitted to the bank in relation to his loan application, (presumably with Ogando's assent), it would be nice to know how and by whom these documents were created.

<sup>&</sup>lt;sup>1</sup> By letter dated June 17, 2010, Steven B. Chesler stated that he had been retained by the Respondent to represent it for the remainder of the proceedings.

By letter dated June 16, 2010, the General Counsel advised me that it was her office's opinion that no further hearings are called for or necessary.

The Respondent's counsel, by letter dated July 9, 2010, advised me of his position regarding the remand; asserting that the record as it stands would support the conclusion that Ogando had substantial interim earnings for the period in question and did not tell the truth regarding those earnings. He also indicated that he "welcomes the opportunity to present additional testimony and evidence regarding these issues." However, the Respondent did not identify any particular witnesses that it would call or identify what their testimony might be. In substance, the Respondent states that it would be useful to "track down the realtor that was assisting Ogando, Diaz and Rivera with the [house] purchase."

It seems highly unlikely to me that the realtor could be located or that it would be possible, at this point in time, to ascertain how the loan documents were created. Therefore, I think that it would be futile to reopen the hearing.

As noted above, Ogando was illegally discharged on August 28, 2001. He testified that he did not start looking for work until November 2001 which is nine weeks after his discharge. Ogando attributed his failure to look for work during this period because of the September 11, 2001 attack on the World Trade Center. I don't really understand this contention and I think that it is a non-sequiter. Despite the attack, the New York economy did not come to a halt and I can't understand how he could conclude that no jobs were available and therefore that it would be future to look for work.

In *Grosvernor Resort*, 350 NLRB 1197 (2007), the Board held that discriminatees who fail to commence a search within the two week period after their discharge will not begin to accrue backpay until they commence a proper search. Even assuming that the Board may determine that two weeks is an unreasonably short period of time, Mr. Ogando's two month delay in commencing his job search seems to me to be excessive. On this basis, I therefore will deny him backpay for the 3<sup>rd</sup> quarter of 2001 and for five weeks of the 4<sup>th</sup> quarter of 2001. Thus, for Quarter four of 2001, his gross backpay would be \$430 times 8 or \$3440. As his testimony that he had no interim earnings in 2001 was not challenged by any contrary evidence, his net backpay for that quarter would be \$3,400.

The more serious question involves backpay for the period from the beginning of 2002 until June 7, 2004.

The Respondent introduced into evidence a W-2 form for Ogando that was submitted with a mortgage application for a house in Brooklyn, New York that Ogando purchased in partnership with Angel Diaz. This W-2 form stated that for the year 2002, Ogando earned \$66,123 from a company called Royal Quality General Construction Inc., a company, alternatively called Royal Roofing, and which was owned by Angel Diaz. Angel Diaz was described as being a good friend of Ogando and given that relationship and their partnership in the purchase of the house, I would not view Diaz as being a disinterested witness. I also note that Diaz testified that he allowed Ogando to falsely assert that he was employed by his company when Ogando made a job application to Whole Foods.

The Respondent also introduced into evidence pay statements that showed that Ogando was issued two checks in 2003 from Royal Qulity General Construction. These pay statements

5

10

15

20

25

30

35

40

45

also stated that his year to date earnings were \$56,269.2

The General Counsel, after participating in a conference call with the bank that issued the mortgage, agreed that the above described documents were in fact submitted to the bank along with the mortgage application that was submitted by the real estate agent who arranged for the mortgage. I can only assume that the W-2 and pay statement documents that were submitted in support of the loan were submitted with the assent of Ogando.

Given the documentary evidence showing that Ogando had higher substantial interim earnings in 2002 and 2003, the Respondent therefore has met its burden of showing that the discriminatee had higher interim earnings than what was claimed by the General Counsel in the Specification or what Ogando had originally told the General Counsel. The burden therefore shifts back to the General Counsel to rebut the Respondent's showing of Ogando's interim earnings.

15

20

5

10

Ogando denied ever working for Royal Quality General Construction and this was corroborated by Angel Diaz. But, there is no dispute that the documents showing that he had substantial earnings from this company were submitted on his behalf to a bank in order for him to obtain a \$262,000 loan. Given these documents that had to have been submitted by him or submitted with his consent, I do not credit, on this record, Ogando's assertion that he had little or no interim earnings in 2002 and 2003. Nor do I credit the testimony of his friend Angel Diaz. Moreover, I conclude that Ogando would have continued to work for Royal Quality General Construction, at a comparable rate of pay, during the first five months of 2004 until he was employed by Whole Foods.

25

In light of the above, I conclude **(a)** that Ogando's interim earnings for each quarter of 2002, 2003 and the first and second quarters of 2004, exceeded the gross backpay calculations made on his behalf for those years; and/or **(b)** that for this period of time, Ogando willfully concealed his interim earnings.

30

I therefore conclude that Ogando's net back pay for 2002, 2003 and the first and second quarters of 2004, is zero. I also conclude that for 2001, his net backpay is \$3,400.00. I therefore amend my calculations and conclude that his net backpay, plus interest is \$18,514 + \$3,400 = \$21, 914.

35

Dated Washington, D.C., July 16, 2010.

40

45

50

Raymond P. Green Administrative Law Judge

<sup>&</sup>lt;sup>2</sup> In the original decision, I mistakenly asserted that the pay statements showed that Ogando's pay was \$56,269.19 as of October 31, 2006. This should have been for October 31, 2003.

<sup>&</sup>lt;sup>3</sup> This case was originally heard before the sub-prime mortgage crisis became public. Nor was I aware of what has been euphemistically called "liar loans." It may be that the documents submitted by the real estate agent to the bank were forgeries created to insure the approval of the mortgage application. But the record does not show that this was the case. Perhaps Ogando and Diaz would have testified, if the case were reopened, that they participated in a fraudulent scheme with the realtor to obtain money from a bank. But the General Counsel does not think that the hearing should be reopened and no offer of proof was made to show this possibility.